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OFFICE OF PETITIONS

In re Patent No. 7,135,862 :
Issue Date: November 14, 2006 :
Application No. 09/803,819 : DECISION DENYING PETITION
Filed: March 13, 2001 :
Attorney Docket No. 7420-081-999 :

This is a decision on the petition filed February 27, 2008, which is properly treated as a petition under 37 CFR 1.10(c) requesting that the above-identified application be considered as filed on March 12, 2001, which is the “date-in” or other official USPS notation on the Express Mail Mailing Label, instead of the currently accorded filing date of March 13, 2001.

The petition is **DENIED**.¹

BACKGROUND

Patentee filed a petition on April 23, 2007, alleging that patentee deposited the original application papers with the United States Postal Service (USPS) via Express Mail on March 12, 2001. Patentee maintains that the application was entitled to a filing date of March 12, 2001 rather than the presently accorded filing date of March 13, 2001.

In support of the petition, patentee has provided a copy of Express Mail Label No. EL501637971US the same Express Mail Label number found on the application transmittal sheet. The Express Mail Label shows a date-in of March 12, 2001. However, the Office issued a filing date of March 13, 2001. The application matured into patent on November 14, 2006. A petition seeking to change the filing date was filed on April 23, 2007. The petition was dismissed on January 3, 2008, because the petition was untimely.

STATUTES AND REGULATION

37 CFR § 1.10 states:

(a)

(1) Any correspondence received by the U.S. Patent and Trademark Office (USPTO) that was delivered by the “Express Mail Post Office to Addressee”

¹This decision may be viewed as a final agency action within the meaning of 5 U.S.C. §704 for purposes of seeking judicial review. See MPEP 1002.02.

service of the United States Postal Service (USPS) will be considered filed with the USPTO on the date of deposit with the USPS.

(2) The date of deposit with USPS is shown by the "date in" on the "Express Mail" label or other official USPS notation. If the USPS deposit date cannot be determined, the correspondence will be accorded the USPTO receipt date as the filing date. See § 1.6(a).

(b) Correspondence should be deposited directly with an employee of the USPS to ensure that the person depositing the correspondence receives a legible copy of the "Express Mail" mailing label with the "date-in" clearly marked. Persons dealing indirectly with the employees of the USPS (such as by deposit in an "Express Mail" drop box) do so at the risk of not receiving a copy of the "Express Mail" mailing label with the desired "date-in" clearly marked. The paper(s) or fee(s) that constitute the correspondence should also include the "Express Mail" mailing label number thereon. See paragraphs (c), (d) and (e) of this section.

(c) Any person filing correspondence under this section that was received by the Office and delivered by the "Express Mail Post Office to Addressee" service of the USPS, who can show that there is a discrepancy between the filing date accorded by the Office to the correspondence and the date of deposit as shown by the "date-in" on the "Express Mail" mailing label or other official USPS notation, may petition the Director to accord the correspondence a filing date as of the "date-in" on the "Express Mail" mailing label or other official USPS notation, provided that:

(1) The petition is filed promptly after the person becomes aware that the Office has accorded, or will accord, a filing date other than the USPS deposit date;

(2) The number of the "Express Mail" mailing label was placed on the paper(s) or fee(s) that constitute the correspondence prior to the original mailing by "Express Mail;" and

(3) The petition includes a true copy of the "Express Mail" mailing label showing the "date-in," and of any other official notation by the USPS relied upon to show the date of deposit.

OPINION

A review of the record confirms that the first time the issue of the filing date was raised was on April 23, 2007, well after the issuance of the patent. While the Office does not dispute that application papers were filed via Express Mail on March 12, 2001, the fact that the Office no longer has jurisdiction over the patent upon issuance except as provided in 35 U.S.C. 135, 35 U.S.C. 251 through 256, 35 U.S.C. 302 through 307 and 35 U.S.C. 311 through 316 precludes the Office from changing the filing date in an issued patent, where the issue was not raised prior to issuance of that patent. See MPEP 1305.

CONCLUSION

The prior decision dismissing petition under 37 CFR 1.10(c) to correct the filing date has been reconsidered. For the reasons set forth herein the filing date cannot be changed in the issued patent.

Telephone inquiries concerning this matter may be directed to the Petitions Attorney Charlema Grant at 571-272-3215.



Charles Pearson
Director
Office of Petitions